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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 465

ROSE KATZ,

Petitioner,

v.

IRA G. KATZ,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

BRIEF FOR RESPONDENT IN OPPOSITION

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Does a New York separation decree granted to the wife on the ground of abandonment (where husband withdrew his counterclaim and consented to the alimony award) bar a Florida Court from granting the husband a divorce on the ground of extreme cruelty where the wife not only personally appeared to defend but also sought and obtained affirmative relief, and the husband proved acts of cruelty subsequent to the New York separation decree?	
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BRIEF FOR RESPONDENT IN OPPOSITION

The following abbreviations will be used:

R — Record
PC — Petition for Certiorari
PA - Petitioner's Appendix
RA — Respondent's Appendix

QUESTION PRESENTED

Does a New York separation decree granted to the wife on the ground of abandonment (where husband withdrew his counterclaim and consented to the alimony award) bar a Florida court from granting the husband a divorce on the ground of extreme cruelty where the wife not only personally appeared to defend but also sought and obtained affirmative relief, and the husband proved acts of cruelty subsequent to the New York separation decree?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provision set out in Petition for Certiorari, the instant case also involves New York Statutes, Section 1161, and Florida Statutes, Section 65.04.

Florida Statutes, § 65.04:

> Grounds for divorce. — No divorce shall be granted unless one of the following facts shall appear:
>
> * * * *
>
> (4) Extreme cruelty by defendant to complainant.

Civil Practice Act New York. § 1161 (1955, Now Domestic Relations Law § 200):

> § 1161. **Action for separation; when maintainable.** An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes:
>
> 1. The cruel and inhuman treatment of the plaintiff by the defendant.
>
> 2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the latter to cohabit with the former.
>
> 3. The abandonment of the plaintiff by the defendant.
>
> 4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.
>
> 5. . . . .

STATEMENT OF THE CASE

Rose Katz personally appeared in Florida to defend against her husband's complaint for divorce. Her two-count counterclaim (R 12-14) sought to increase her New York consent alimony award from $18,000 per annum ($346.15 per week) to $60,000 per year (R 13), and in addition, all attorneys, fees, suit money, court costs, etc. (R 14). Ira Katz was awarded a Final decree of divorce **a vinculo** on the ground of cruelty (R 40). Rose Katz was awarded $166,500 lump sum alimony payable over a twelve-year

period, said sum to become a charge against the estate of the 74-year-old respondent (R 41). Further, the decree required that the lump sum award be secured (R 41). Mrs. Katz was also awarded in excess of $18,000 for attorneys' fees and court costs. Accepting the aforementioned benefits without prejudice, Mrs. Katz appealed to the District Court of Appeal of Florida, Third District, urging as one of her grounds (now abandoned) that the Chancellor's alimony award was inadequate.[1]

Background of the Controversy

Ira Katz, now 74 years old (R 6), married Rose Katz, now 55, in July of 1945 (R 2). Both parties had previously been married (R 1). Mrs. Katz was a divorcee without children (R 1). Mr. Katz was a widower with five children, three of whom had not attained their majority (R 2).

For purposes of this reply, respondent will summarize only that evidence which proved petitioner's acts of cruelty occurring **subsequent** to the New York separation decree of 30 April 1956. Respondent will not summarize the evidence adduced before the Chancellor which proved the wife's acts of cruelty prior to the entry of said New York separation decree. Those prior acts had been the subject of respondent-husband's New York counterclaim which had been withdrawn at the time he stipulated to the entry of the $18,000 alimony award. It is undisputed that the parties never lived together after 24 December 1955 (R 34).

Without contradiction, Sarah and Ben Kessner, key employees of Ira G. Katz, Inc., respondent's business en-

[1]Katz v. Katz, (Fla. App. 3rd 1964) 159 So. 2d 641.

terprise, testified that after the final separation of the parties, Rose Katz continued to call them at their home and at the factory and discuss her domestic problems (R 72-74, RA 3-9). She denied obscenities.

Ben Kessner testified that as late as August 1958, Mrs. Katz telephoned and advised him that he should make sure that he would be taken care of as far as the business was concerned "because Mr. Katz was not trustworthy and the children were not!" (R 77; RA 8). She called him (Ira Katz) a f-----g bastard; she said all of his children were bastards, and so forth. She said, "You should take care of yourself insofar as your future in the business is concerned." (R 75-76). Sarah Kessner testified of similar conversations with Rose Katz which had occurred after the parties finally separated in December of 1955, wherein Rose Katz had warned her to "watch and see that he didn't screw you like he did her." (R 73; RA 5)

Rose Katz testified that she called Sarah Kessner as late as 24 August 1962 (R 70; RA 2). Rose Katz testified that in December of 1962, during the proceeding **sub judice** by ruse she entered and searched a New York apartment then under lease to Mr. Katz (R 71), pursuant to a three-year lease, which lease commenced in 1960, and which Ira Katz had unsuccessfully attempted to sublease. Mrs. Katz also testified that there was no chance for the marriage, and that she didn't want respondent back (R 69, RA 1).

REASONS FOR DENYING THE WRIT

1. **Petitioner's acts of cruelty which occurred subsequent to the New York separation decree make moot her contention of res judicata.** In framing her question presented for review (PC 2), petitioner begs the issues. Petitioner ignores that the record contains competent substantial evidence of her acts of cruelty subsequent to the New York decree of separation of 30 April 1956 continuing almost up until the day of the final decree of divorce (R 70; RA 3-9).

In Paragraph 10 of his Florida Complaint filed May, 1962, Ira Katz alleged (R 4):

> "That on different occasions during the past years of their marriage, and more particularly in 1953 and 1954, Defendant had made frequent daily telephone calls to Plaintiff's place of business, and had engaged him in conversations, upbraiding him and castigating him, and also on some of such occasions, spoke to employees of Plaintiff, and in such conversations called Plaintiff and his children, some of whom are in business with Plaintiff, vile and obscene names."

Without objection, Sarah and Ben Kessner, key employees of Ira G. Katz, Inc., testified that after the final separation of the parties in December 1955, Rose Katz continued to call them at their home and at the factory and discussed her marital problems and warned them, as late as 1958, to be wary of Ira Katz (R 72-76; RA 3-9). Rose Katz herself testified of her bold entry into the New York apartment of Ira Katz in December of 1962

(R 70). The record abounds with competent substantial evidence of misconduct by Rose Katz towards Ira Katz subsequent to the separation decree of 30 April 1956.

In **Coleman v. Coleman,**[2] the Florida Supreme Court took notice that plaintiff's husband was a pharmacist by profession, and that his wife, "went to the store where plaintiff was employed and engaged in heated arguments with him . . . When plaintiff objected to her activities, she resorted to profanity and called him insulting names in the presence of others."

In reversing the Chancellor, and ordering that a divorce be granted to the husband, the Florida Supreme Court stated:

> "The bonds of matrimony were never designed to wreck the health or to become burdensome or materially destroy the business of those assuming them, but on the other hand they are intended to promote or advance the mutual best interest and general welfare of all those entering the portals of that ancient institution."

In **Berman v. Berman,**[3] in affirming a divorce to the husband on extreme cruelty, the Court took note that the wife never failed to call the clients of her husband and make disparaging remarks about her, to his great embarrassment.

In **Macaluso v. Macaluso,**[4] a New York court had

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[2](Fla. 1946) 26 So. 2d 445.

[3](Fla. S. Ct. 1958) 103 So. 2d 611. For convenience, the Berman opinion is set forth in full in the Appendix hereto at RA 9-18.

[4](1960) 207 N.Y.S. 2d 105.

occasion to determine the weight to be given a Florida divorce decree to the husband predicated upon service by publication in light of a prior New York separate maintenance decree in favor of the wife. The New York court stated:

> " . . . Comparing these specific allegations with the bill of complaint for divorce in Florida and the transcript of testimony taken at Miami, Florida, on March 4, 1955, this court concludes that although some acts of cruelty proven before the Master in Florida included specific acts common to the New York counterclaim for separation, additional and separate acts of cruelty were alleged and proven in Florida to the satisfaction of the Master in Florida. The Florida bill of complaint charged Minnie A. Macaluso with neglect, calling the homes of Mr. Macaluso's customers, charged her with interfering with his business, interrogating women customers, calling him vile and obscene names, stamping on his mother's grave and attacking him with a knife on July 15, 1952. In Florida, the testimony of Joseph N. Macaluso was corroborated by one Helen Di Pasquale, a former resident of Buffalo, New York, who had moved to Florida. She testified that at a time after Joseph N. Macaluso had separated from his wife, Minnie A. Macaluso would call him at the Di Pasquale home at Randolph, New York, and threaten to kill him if she saw him. This witness testified that she had seen Minnie A. Macaluso go into tantrums 'many times' in arguing with her husband."

2. The Florida court had jurisdiction over the parties and the subject matter, sub judice.

a. **Respondent Ira Katz is a bona fide resident of Florida.** The Florida courts have adjudicated that Mr. Katz is a resident of Florida[5] (R 65, PA 2), and Mrs. Katz has abandoned any contention to the contrary. **Davis v. Davis**, 305 U.S. 32, 83 L. Ed. 26, 59 S.Ct. 3, 118 ALR 1518.

b. **Rose Katz personally appeared in the Florida forum.** Petitioner-Wife not only answered the complaint but vigorously urged her right to affirmative relief (R 12-14).

c. **Petitioner Rose Katz sought and received affirmative relief in the Florida proceedings.**[6] Petitioner was awarded $166,500 lump sum alimony which was secured and would become a charge against the estate of respondent should Ira Katz predecease her (R 40). Pursuant to court order Ira Katz paid in excess of $18,000 for petitioner's attorneys' fees and court costs.

3. **There is no question of compliance with the essential requirements of procedural due process.** In **Sherrer v. Sherrer**, 334 U.S. 346, 348, 92 L. Ed. 1431, 1434, 68 S.Ct. 1087, 1 ALR 2d 1355, this Court stated:

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[5] "Katz v. Katz, (Fla. App. 3rd 1964), 180 So. 2d 643, R 65 PA 21.

"No error is found in the Chancellor's finding that the husband was a resident of Florida . . . .

[6] See Helman v. Helman 73 N.Y.S. 2d 32 (1947), more fully discussed at page 21, *infra*.

[7] *Cf.* Estin v. Estin, 334 U.S. 541, 92 L. Ed. 1561, 68 S. Ct. 1213, 1 ALR 2d 1412, and Vanderbilt v. Vanderbilt, 354 U.S. 416, 1 L. Ed. 2d 1456, 77 S. Ct. 1360 (1957), upholding the "divisible divorce" concept where there is no personal appearance of the wife in the divorcing forum.

"At the outset, it should be observed that the proceedings in the Florida court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process. We do not understand respondent to urge the contrary. The respondent personally appeared in the Florida proceedings. Through his attorney he filed pleadings denying the substantial allegations of petitioner's complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired; nor is it suggested that there was not available to him the right to seek review of the decree by appeal to the Florida Supreme Court. It is clear that respondent was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner's domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts. Chicago L. Ins. Co. v. Cherry, 244 US 25, 61 L ed 966, 37 S Ct 492 (1917); Baldwin v. Iowa State Traveling Men's Asso., 283 US 522, 75 L ed 1244, 51 S Ct 517 (1931)."

In the companion case to **Sherrer, supra, Coe v. Coe,** 334 U.S. 378, 92 L. Ed. 1451, 68 S. Ct. 1094, 1 ALR 2d 1376, this Court held:

"Nor has it been suggested that the proceedings before the Nevada court were in any degree violative of the requirements of procedural

due process or that respondent was denied a full opportunity to contest the issue of petitioner's Nevada domicile.

4. The Florida courts correctly held that the law as set forth in Berman v. Berman (Fla. 1958) 103 So. 2d 611, is controlling. (RA 9-18).

In affirming the Chancellor below the District Court of Appeal of Florida, Third District, stated (R 64-66, PA 3-4):

> "[6] At the time of oral argument on the reversal of the final decree in this case, the principal contention urged was the res adjudicata of the previous domestic litigation in the State of New York, which resulted in a decree of separation being entered on behalf of the wife. In view of the decision of the Supreme Court of Florida in the case of Berman v. Berman, (Fla. 1958) 103 So. 2d 611, it is apparent that the chancellor was correct in failing to sustain the affirmative defense of res adjudicata. The facts in the instant case were almost identical to those related in Berman v. Berman, supra. In this cause, the wife filed a complaint for separation; the husband answered and filed a counterclaim seeking a separation, urging extreme cruelty. Thereafter, it can be reasonably inferred from the record [because of activities of counsel for the wife] that the husband sought a settlement of their domestic litigation, which was accomplished, and the wife filed an amended complaint. The husband withdrew his original

counterclaim, filed an answer to the amended complaint, and the New York judge entered a decree of separate maintenance providing for weekly payments to the wife totaling $18,000.00 a year, which payments the wife accepted at all times. This decree was entered upon proofs. [7] The only apparent difference between the Berman v. Berman case, supra, and the instant case is that one was submitted on affidavits and the other on proofs. In the Berman v. Berman case, supra, the Supreme Court held that the actions in New York were not res adjudicata as to the action in Florida by the husband. In the instant case, it appears that the decision in Berman v. Berman, supra, should control and that the husband's action for divorce in Florida should not be barred by the previous New York litigation . . . "

Mrs. Katz, like Mrs. Berman, obtained a separation from bed and board in New York on the ground of abandonment (after first obtaining temporary alimony on ex parte affidavits). Mr. Katz, like Mr. Berman, counterclaimed and then withdrew his defenses and counterclaim, did not appear at the trial and consented to the entry of a judgment ($18,000 for her support and maintenance).

It appears that Mrs. Berman actually testified at the trial, while it appears that Mrs. Katz appeared only by counsel.

Mr. Katz, like Mr. Berman, then filed suit in Dade County, Florida, alleging extreme cruelty. Mrs. Katz,

like Mrs. Berman, pled **res judicata** and estoppel by judgment. The Florida Supreme Court, in **Berman v. Berman,**[1] and in a long line of cases, unequivocally answered these issues:

> [1] In these circumstances it cannot be said that the "points and questions" presented in the instant suit for divorce were "actually litigated and decided" in the New York proceeding. Gordon v. Gordon, supra. The fact that the ex parte affidavits of the parties, containing among others, their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, were considered by a trial judge as a predicate for his award of temporary support to the wife is immaterial here, since it affirmatively appears that there was no actual trial of these charges nor any adjudication thereof. Moreover, in order to sustain a charge of "cruel and inhuman treatment" under § 1161 of the New York statute as a ground for separation from bed and board, there must be proof of either actual violence committed with danger to life, limb or health, or a reasonable apprehension of such violence. See Marino v. Marino, Sup. 1955, 145 N.Y.S.2d 571, and authorities cited. No cases need be cited in support of the proposition that this is a far greater degree of proof than is required to support a charge of "extreme cruelty" or "ungovernable temper" under the Florida divorce statute. § 65.04, Fla.Stat.1957, F.S.A.

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[1] (Fla. S. Ct. 1958) 103 So.2d 611 (RA 9).

It is true that the trial judge stated in his opinion filed in the New York proceedings (but not in the judgment of separation itself) that the husband abandoned the wife "without provocation" on her part. But the New York statute, § 1161, supra, states as a ground for separation "the abandonment of the plaintiff by the defendant", **not** "the abandonment of the plaintiff by the defendant without provocation." Apparently, the wife's misconduct is a defense that must be pleaded and proved by the husband under § 1163, supra, and it affirmatively appears from the record here that the husband withdrew his defense to the wife's action and that no evidence was adduced **at the trial** as to the wife's misconduct. Thus, the only "point in question" actually litigated and decided at the trial was that the husband abandoned the wife. Even if it be assumed arguendo that § 1161, supra, should be interpreted to mean "abandonment without provocation" as a ground for separation judgment, the question is concluded by the decision of this court in Horn v. Horn, Fla.1956, 85 So.2d 860, 861. There, a New York judgment of separation from bed and board in favor of the husband on the ground of abandonment was pleaded as a defense to the wife's suit for divorce in Florida on the grounds of extreme cruelty and habitual intemperance. In holding that the wife's suit was not barred, this court said that "where one spouse brings separate maintenance proceedings on the ground of abandonment, the judgment secured is not res judicata or estoppel as to Florida divorce pro-

ceedings by the other spouse on grounds of of alleged habitual intemperance or extreme cruelty since the actions are entirely different.

In **Horn v. Horn**[9] the Florida Supreme Court held that a New York decree granted to the husband on the ground of abandonment did not bar the wife's action in Florida for divorce on the ground of her husband's habitual intemperance:

> "The primary question is whether or not the New York decree granting the husband a divorce from bed and board on the ground of abandonment bars the wife's action for divorce in Dade County on the ground of habitual intemperance.
>
> In our view the question requires a negative answer on authority of Gordon v. Gordon, Fla. 1952, 59 So. 2d 40; Coleman v. Coleman, 157 Fla. 515, 26 So. 2d 445, and Roy v. Roy, Fla. 1954, 73 So. 2d 294. These cases approve the doctrine that where on spouse brings separate maintenance proceedings on the ground of abandonment, the judgment secured is not res judicata or estoppel as to Florida divorce proceedings by the other spouse on grounds of alleged habitual intemperance or extreme cruelty since the actions are entirely different."

In **Roy v. Roy**[10] a Washington, D. C. separation decree was entered in favor of the wife. The husband

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[9] (Fla. S. Ct. 1956) 85 So. 2d 860.

[10] (Fla. S. Ct. 1954) 73 So. 2d 294, *cert. den.* 348 U.S. 8, 3, 99 L. Ed. 687.

brought suit for divorce on the ground of habitual intemperance together with extreme cruelty and desertion. In upholding the Chancellor's decree of divorce to the husband, the Supreme Court of Florida held:

> "The causes of action were entirely different. In the Washington, D. C. suit the appellant merely alleged desertion and cruelty as a ground for separate maintenance. In the Florida suit for divorce the appellee alleged habitual intemperance was not an issue in the Washington, D. C. suit and it was an issue in the Florida suit, and the evidence was more than sufficient to sustain the Chancellor in finding that the appellant had been guilty of habitual intemperance."

See also **Shirley v. Shirley,** (Fla. App. 1958) 100 So. 2d 450; **Coleman v. Coleman,** (1946) 157 Fla. 515, 26 So. 2d 445; **Bernstein v. Bernstein** (1948), 160 Fla. 654, 36 So. 2d 190; and **Roseman v. Roseman** (1945), 155 Fla. 750, 21 So. 2d 215.

5. Florida courts are not required to give more weight to the New York separation than are New York courts.

It is apodictic that a "judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the state where rendered." **New York v. Halvey,** 330 US 610, 614, 91 L. Ed. 1133, 1136, 83 S.Ct. 275 (1947).

In **Lynn v. Lynn,**[11] a New York Court of Appeals

[11] 302 N.Y. 193, 97 N.E. 2d 748, 28 ALR 2d 1335, (1951)

was confronted with a factual situation similar to the case at bar. This Court denied certiorari on 15 October 1951, 342 US 849, 96 L. Ed. 640, 72 S.Ct. 72. The wife had been granted a New York separation decree on the basis that her husband had abandoned her without justification. Fifteen months later husband filed suit in Nevada. The wife personally appeared, challenging domicile and defending on the merits. The Nevada court granted a divorce to the husband on the grounds of acts of extreme cruelty committed by the wife subsequent to the New York decree, and adjudicated that the husband's Nevada residence was **bona fide.** The Nevada decree made no provision for alimony and recited that the wife had made no claim therefor. The husband returned to New York and continued support payments. The wife then sought an increase in alimony in the New York proceedings. The husband defended on the basis of the Nevada decree. The New York Court of Special Term denied the wife's motion, holding that the Nevada divorce decree terminated the husband's obligation. The New York Appellate Division reversed upon the ground, **inter alia,** that New York was not required to give full faith and credit to the Nevada because Nevada had not given full faith and credit to New York. In reversing the Appellate Division, the Court of Appeals held:

> ****And even if we were to accept the view of the Appellate Division that the Nevada court, in decreeing the divorce, failed to give appropriate effect to the adjudication made in the New York action, the courts of this state would still be required to accord full faith and credit to the Nevada decree. Nevada's asserted denial of full faith does not justify or permit retaliation

by any other state. As the decisions make plain, plaintiff's only remedy to correct the alleged error was by direct appeal from the Nevada judgment through the Nevada courts and, if necessary, to the Supreme Court of the United States. See Morris v. Jones, 329 US 545, 552, 67 S Ct 451, 91 L Ed 488; Treinies v. Sunshine Mining Co. 308 US 66, 77, 60 S Ct 44, 84 L Ed 85; Roche v. McDonald, 275 US 449, 455, 48 S Ct 143, 72 L Ed 365; Fauntleroy v. Lum, 210 US 230, 237, 28 S Ct 641, 52 L Ed 1039; see also, Estin v. Estin, supra. 296 NY 308, 312, 73 NE2d 113, 114, affirmed 334 US 541, 68 S Ct 1213, Restatement, Judgements, §42, Comment a. p 165.

* * * *

****In the Estin case, Chief Judge Loughran, writing for a unanimous court, analyzed the law on the subject in this way, 296 NY at pages 312-313, 73 NE2d at page 115: "A divorce decree (whether foreign or domestic) granted by a court having jurisdiction of the persons of both parties may very well be held to override any incongruous alimony provision of an earlier domestic judgment of separation. See Scheinwald v. Scheinwald, 231 App Div 757, 246 NYS 33; Richards v. Richards, 87 Misc 134, 149 NYS 1028, affirmed 167 App Div 922, 152 NYS 1140; Holmes v. Holmes, 81 US App DC 132, 155 F2d 737, 166 ALR 1000. But the **res judicata** principle of the cases just cited—that as between two conflicting adjudications the last must control—has no application where, as in the present case, the court which granted

the last judgment was without jurisdiction of the person of the defendant. Cf. Miller v. Miller, 200 Iowa 1193, 206 NW 262; Wagster v. Wagster, 193 Ark 902, 103 SW2d 638; 2 Freeman on Judgments, 5th Ed. § 629.

* * * *
* * * *

That we reach a result in the case before us different from that in Estin v. Estin and Kreiger v. Kreiger merely because of the added circumstance that Mrs. Lynn chose to appear and participate in the proceedings in Nevada, may seem to some inequitable. The explanation, though, is clear and decisive. The additional factor present in this case operated to give the Nevada court jurisdiction of the wife's person and, by that token, vested that tribunal with power to adjudicate the wife's right of support as well as the parties' marital status. That being so, our conclusion is here compelled by the command of the full faith and credit clause, for, as the Supreme Court has recently declared, Sherrer v. Sherrer, supra. 334 US 343; 355, 68 S Ct 1087, 1093, "If in its application local policy must at times be required to give way, such 'is part of the price of our federal system.' Williams v. North Carolina, 1942, 317 US 287, 302, 63 S Ct 207, 215 [87 L Ed 279]."

In 1953 a New York court in **Macaluso v. Macaluso**

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[2]207 N.Y. S 2d 105 (1960)

granted a wife a separation decree and permanent alimony and dismissed the husband's counterclaim on the merits. In 1955 a Florida court granted the husband a divorce on the ground of extreme cruelty predicated upon constructive service on the wife who never appeared in Florida. In a subsequent New York partition suit between the parties involving property rights, the Court, in considering the validity of the Florida divorce decree, stated:

> 1. The Florida divorce was legally entered in accordance with the statutes provided in the State of Florida.
>
> [1] 2. That under Article IV, Section 1, of the United States Constitution, the State of New York must give full faith and credit to the public acts, records and judicial proceedings of the State of Florida insofar as the Florida decree severs the marital status of the parties. However, said Florida decree did not alter or vary the requirements of the New York separation decree requiring Joseph N. Macaluso to pay alimony to his wife. See Estin v. Estin, 296 N.Y. 308, 73 N.E.2d 113, certiorari denied 332 U.S. 760, 68 S.Ct. 62, 92 L.Ed. 346. Lynn v. Lynn, 275 App.Div. 269, 88 N.Y.S.2d 791, reversed 302 N.Y. 193, 97 N.E.2d 748, certiorari denied 342 U.S. 849, 72 S.Ct. 72, 96 L.Ed. 640; Vanderbilt v. Vanderbilt, 207 Misc. 291, 138 N.Y.S.2d 222, affirmed 1 N.Y.2d 342, 153 N.Y.S.2d 1, certiorari granted 352 U.S. 820, 77 S.Ct. 67, 1 L.Ed.2d 45, affirmed 354 U.S. 416, S.Ct. 1360, 1 L.Ed.2d 1456.

3. * * * *

4. The New York decree of separation is not res judicata on the question of plaintiff's alleged cruel and inhuman treatment of her husband. As indicated above, the husband's counterclaim for legal separation, based on the cruelty of his wife, was dismissed on the merits by Justice Williams (a large portion of the **Macaluso** opinion appears at page 8 **supra**).

In **Helman v. Helman**[13], in a contested trial, a New York court in May of 1946 granted the wife a separation and support and maintenance of $35.00 per week. In January of 1947, the husband filed suit for divorce in Nevada and the wife answered and cross-claimed. The Nevada court granted the wife's divorce and $15.00 per week alimony and $25.00 per week child support. When the husband reduced payments to $20.00 per week, the wife sought arrearages due under the New York decree and a declaration that the New York decree is superior to Nevada with respect to the payment of alimony. The New York court, in recognizing the superiority of the Nevada decree in all respects over the prior New York separation decree, distinguished that case from Estin[14], stating:

****The Court said, at page 312 of 296 N.Y., at page 115 of 73 N.E. 2d: "A divorce decree (whether foreign or domestic) granted by a

[13]73 N. Y. S. 2d 32 (1947)

[14]Estin v. Estin, 296 N.Y. 312, 73 N.E. 2d 115, *cert. granted* 334 US 541, 92 L.Ed. 1561, 68 S.Ct. 1213, 1 ALR 2d 1412.

court **having jurisdiction of the persons of both parties** may very well be held to override any incongrous alimony provision of an earlier domestic judgment of separation (citing cases). But the **res judicata** principle of the cases just cited—that as between two conflicting adjudications the last must control—has no application where, as in the present case, the court which granted the last judgment **was without jurisdiction of the person of the defendant.**" (Emphasis supplied by the Court.)

* * * *

[2] In the instant case, however, the factor found missing in the Estin case is present. Here, although the wife obtained a judgment of separation in New York, she subjected herself thereaffter to the jurisdiction of the Nevada court. In fact, she did more; she counterclaimed and obtained an affirmative decree which stated that she recognized its superiority to the New York decree. The Nevada court thus had jurisdiction over both the plaintiff and the defendant, and its decree finally determined the issue with respect to alimony. That decree therefore vitated the prior New York judgment of separation. To paraphrase the language of the Court of Appeals in the Estin case, supra, as between two conflicting adjudications, the last must control, where jurisdiction was obtained over both of the parties.

CONCLUSION

There is an abysmal failure by petitioner to establish any basis for certiorari jurisdiction. The acts of cruelty of the petitioner which occurred after the entry of the New York separation decree makes moot all subsequent argument concerning legal niceties contained in the petitioner's argument of **res judicata** and the full faith and credit clause. Moreover, even in the absence of subsequent acts of cruelty by the wife, where the wife appeared before the Florida court and sought and obtained affirmative relief, the courts of New York have left no doubt that the most recent decree is superior and supersedes the prior New York decree. For the reasons and upon the authorities cited herein, we respectfully submit that the Petition for Writ of Certiorari should be denied.

Dated 14 October 1964.

Respectfully submitted,

PAUL A. LOUIS

MILTON FERRELL
Counsel for Respondent

BERTHA CLAIRE LEE
of Counsel

Respondent's Appendix

APPENDIX

EXCERPTS OF THE DEPOSITION OF ROSE KATZ TAKEN IN NEW YORK ON 23 AUGUST 1962.

(R 69)

Q You wanted to take him back still?

A No, I didn't want to take him back. I wanted to get back to New York.

• • •

Q It is rather obvious that you and Ira are never going to get together again, is it not?

A That's why I tried to keep it clean and decent. Even in death there is decency.

• • •

EXCERPTS FROM THE TESTIMONY OF ROSE KATZ TAKEN BEFORE JUDGE HAL P. DEKLE AT MIAMI, FLORIDA, ON 3 JANUARY 1963.

(R 70)

"MR. HUMKEY: The question initially was this: 'Is there any chance of this marriage surviving?'

"THE WITNESS: Now? As far as I am concerned, no." Did you say that?

A Yes, I did.

• • •

(R 70)

I called Sarah up, and he said to me, "Is it not true that you brought this other woman to—" and I will not

say what—"You told Sarah because you could no longer function as a woman," in my deposition.

Q What I asked you—

A And I called up, and I said, "Sarah, you do plenty of crooked things. I can't even believe that even you would have said that for money," so she said—

Q I asked you when.

A The day after I gave my deposition.

Q What date, approximately?

A What date was the deposition?

Q August 23, 1962. You called her August 24th?

A I called her August 24th, and those were the exact words, and I hung up.

• • •

(R 71)

Q Now, Mrs. Katz, I believe you stated that last week you went into the apartment of Mr. Katz which he had had under lease for a number of years in New York.

A Yes, sir.

Q How did you obtain entrance into that apartment?

A Mr. Rand, who is in charge of the building, took me in.

• • •

Q You told him you were connected with Mr. Katz?

A I was connected with Mr. Katz, and is it possible for him to take me into the apartment, and he did.

Q You have answered my question. Did you go through his things in his apartment?

A I went through the closet. I looked in the drawers. I saw the telephone, its number. I saw—You mean through—Exactly what do you mean?

Q You opened the drawers?

A I opened the top two drawers of his dresser.

Q You opened the top two drawers?

THE COURT: Talk up a little for me.

THE WITNESS: Yes.

Q (By Mr. Ferrell) You opened up his top two drawers?

A I wanted to see if his underwear and things were there.

* * *

EXCERPTS FROM THE TESTIMONY OF SARAH KESSNER, A WITNESS ON BEHALF OF PLAINTIFF AND COUNTER-DEFENDANT

(R 72)

Q (By Mr. Ferrell) Will you please state your name for the record?

A Sarah Kessner.

* * *

Q What is your occupation?

A I am bookkeeper and secretary with Ira G. Katz, Inc.

Q How long have you been so employed?

A 26 years.

(R 73)

Q How old were you when you went to work with Ira G. Katz, Inc?

A Sixteen.

Q How long have you known the plaintiff, Ira G. Katz?

A Ever since I went to work there 25 years ago.

* * *

Q After the parties separated and ceased living together did Mrs. Katz continue to call you?

A Yes, she did.

Q What did she say to you, if anything, about how you should handle your affairs?

A Well, she felt—

Q Tell us what she said.

A She said that she had not been treated right by Mr. Katz, and that I should look out for myself; that Mr. Katz would take advantage of me and abuse me, and that I should see that the firm took care of me.

Q In that conversation did she use the words "take advantage" of you?

A Yes.

Q Well, tell the Court just how she expressed herself.

A Well, she felt—she used the word "screw"—that they would screw me.

Q What did you tell Mrs. Katz, if anything, in response to that statement she made.

A I told her that I felt that Mr. Katz took very good care of all of us; that he had never done that to anybody that had been associated with him and that I felt very happy and content.

Q When did that occur?

A That occurred many times; it wasn't just one conversation. She would repeat herself on the same sub-

(R 74)

ject many times. It occurred while Mr. Katz was living with her and it occurred while they were separated and after that.

* * *

Q You stated earlier that the parties ceased living together in 1954. Did Mrs. Katz ever telephone you after they separated?

A Yes, she did.

Q And on those occasions what did she say to you?

A It was the same conversation that went on before. She criticized Mr. Katz; she criticized him for not providing for her and she criticized his children.

Q Was she then getting $18,000 a year from him?
A Yes.

Q You mentioned a conversation earlier in which she called you and stated that you had better watch and see that he didn't screw you like he did her. Did she have any such conversation with you as late as April, 1956?

A Yes. She said that very often, sir. She said, "Sarah, look out for yourself and don't let them do to you what they have done to me, and to be careful of them."

Q Did you have any conversation with Mrs. Katz about the parties to this cause discussing a reconciliation and settlement and going on a trip to Jamaica in 1955?

A Yes.

Q Did you have any conversation with her after Mrs. Katz returned to New York from the trip to Jamaica?

A Yes, I did. She called me.

Q Did she state to you that they had reconciled or had not reconciled?

A She said that they discussed the settlement and that she wasn't satisfied.

Q Did she say anything to you as to whether or not they had reconciled?

(R 75)

A There wasn't nothing about reconciling. It was just about a settlement.

Q Did she say anything about attempting to reconcile with her to put her in a worse position?

A Well, she said that Mr. Katz was probably look- to make some sort of a deal as far as the settlement was concerned.

Q She never told you that they had reconciled at any time in 1955?

A No, she did not.

• • •

Q Mrs. Kessner, after the final decree of separation entered in New York on April 30, 1958, did Mrs. Katz warn you at any time subsequent to that to watch out and not get screwed?

A Yes, she did.

Q In that conversation who was she referring to; who did she mention?

A She mentioned Mr. Katz and his children.

• • •

EXCERPTS FROM THE TESTIMONY OF BENJAMIN KESSNER, A WITNESS ON BEHALF OF PLAINTIFF AND CROSS-DEFENDANT.

(R 76)

Q (By Mr. Ferrell) Will you state your name?

A Benjamin Kessner.

• • •

Q Do you know the plaintiff, Ira G. Katz, and the defendant, Rose Katz.

A I do.

Q What type of work do you do?

A I am general manager of Ira G. Katz, Inc.

Q How long have you been working there?

A About 23 years.

. . .

Q Did Mrs. Katz ever telephone your home?

A Many times.

Q Did you answer the telephone on occasions?

A The last time she called—one time she called my wife was out, so I answered the telephone.

Q Did she ever discuss with you anything about Mr. Katz and his children?

A Yes, she did.

(R 77)

Q What did she say to you?

A Well, she more or less referred to the fact that I should make sure that I would be taken care of as far as my business was concerned, because Mr. Katz wasn't trustworthy and the children were not, and she discussed him in certain language which wasn't too nice.

Q Tell us what that language was.

A Shall I say the words?

Q Yes.

A She called him a fucking bastard; she said that all of his children were bastards and so on. She said, "You should take care of yourself insofar as your future in the business is concerned."

Q When did this conversation take place?

A This particular conversation took place in 1958. I don't know the exact month, but it must have been somewhere around August because I know we were moving our premises at that time.

* * *

Opinion of **Berman v. Berman** relied upon by the Florida Courts in affirming as it appears in the Southern Reporter (Fla. Supreme Ct. 1958) 103 So. 2d 611.

Milton B. BERMAN, Appellant,

v.

Felicia C. BERMAN, Appellee.

Supreme Court of Florida.

May 28, 1958.

Rehearing Denied July 1, 1958.

Divorce action. The Circuit Court for Dade County, Charles A. Carroll, J., dismissed the complaint, and plaintiff appealed. The Supreme Court, Roberts J., held that since husband had withdrawn his defense to wife's New

York suit for separation from bed and board and had abandoned his counterclaim for separation on ground of wife's cruel and inhuman treatment of him, and only "point in question" actually litigated and decided at trial in New York action was that husband had abandoned wife, New York judgment would not be bar to husband's subsequent Florida action for divorce on grounds of extreme cruelty and habitual indulgence in a violent and ungovernable temper; and held that it was immaterial that ex parte affidavits of parties, containing their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, had been considered by trial judge in New York action as a predicate for his award of temporary support to wife.

Decree reversed and cause remanded with directions.

Drew, J., dissented.

1. Divorce 383

Where husband had withdrawn his defense to wife's New York suit for separation from bed and board and had abandoned his counterclaim for separation on ground of wife's cruel and inhuman treatment of him, and only "point in question" actually litigated and decided at trial in New York action was that husband had abandoned wife, New York judgment would not be bar to husband's subsequent Florida action for divorce on grounds of extreme cruelty and habitual indulgence in a violent and ungovernable temper; and it was immaterial that ex parte affidavits of parties, containing their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, had been considered by trial judge in

New York action as a predicate for his award of temporary support to wife. Civil Practice Act N.Y. § 1661; F.S.A. § 65.04.

2. Divorce 130, 132

In husband's divorce action, evidence would sustain his allegations of extreme cruelty and habitual indulgence in a violent and ungovernable temper.

Seymour Silverman, Miami Beach, for appellant.

Salley & Roman, Miami, for appellee.

ROBERTS, Justice.

We here review on appeal a decree entered in a suit for divorce filed by the appellant husband against the appellee wife. Insofar as here pertinent, the facts are that the husband's complaint sought a divorce on the grounds of extreme cruelty and habitual indulgence in a violent and ungovernable temper and also prayed for modification of the support provisions ($125 per week) of a New York judgment of separation from bed and board entered in an action brought by the wife against the husband. The wife answered, denying the allegations of the complaint and pleading **res judicata** on the basis of the New York judgment. By counterclaim she also prayed that the court "give full faith and credit to the New York decree in all particulars, including the granting of permanent alimony to the defendant from the plaintiff in the amount of One Hundred Twenty Five ($125.00)

Dollars per week; and will direct the defendant to pay to the plaintiff forthwith all arrearages" under the New York judgment.

The Chancellor heard the evidence of the parties and entered the decree here reviewed. His decree dismissed the husband's complaint with prejudice on the ground of "estoppel by judgment" by virtue of the New York judgment, and on the additional ground "that the plaintiff failed to sustain the material allegations of his complaint by a preponderance of the evidence." The wife's counterclaim was denied "without prejudice".

On this appeal, the husband contends, among others, that the Chancellor erred in dismissing his suit on the ground of estoppel by judgment since this defense was neither pleaded nor proved, and that the Chancellor's finding as to the husbands' evidence, quoted above, was erroneous. The wife complains of the denial of her counter-claim.

The husband's contention as to the propriety of the Chancellor's ruling with respect to estoppel by judgment must be sustained. In Gordon v. Gordon, Fla.1952, 59 So.2d 40, 45, this court, speaking through Mr. Justice Hobson, said:

> "The test with reference to res adjudicata or estoppel by judgment is, and should be, whether the evidence in both cases is in essence the same albeit **under estoppel by judgment it must be determined that 'every point and question' presented in the second action was actually litigated and decided in the first."** (Emphasis added.)

Moreover, it was noted in that case that the rule has an "extension or modification" in that, even where the evidence in both cases is essentially the same, the defenses of res judicata and estoppel by judgment may not be appropriate if the degree of proof necessary to entitle a litigant to the relief sought in the former action is greater than the degree of proof required to establish the right to the relief sought in the subsequent action.

Here, the record contains copies of a portion—not all—of the New York proceedings, the authenticity of which is admitted by the husband. As shown therein, the wife predicated her New York suit for separation from bed and board on the statutory grounds of (1) cruel and inhuman treatment, (2) failure to provide for her maintenance and support, and (3) abandonment. § 1161, New York Civil Practice Act. The husband countered with an answer denying the allegations of her complaint, alleging various acts of misconduct on her part, and counterclaiming for a decree of separation in his favor on the ground of the wife's cruel and inhuman treatment of him. It might be noted that § 1163 of the New York Civil Practice Act provides that "The defendant in an action for separation from bed and board may set up, in justification, the misconduct of the plaintiff; and if that defense is established to the satisfaction of the court, the defendant is entitled to judgment."

The wife then applied in the New York proceedings for temporary alimony, suit money and attorney's fee. On the basis of ex parte affidavits filed by each party, without argument, the trial judge awarded her $100 per week as temporary support and an attorney's fee. This order was dated September 10, 1954. A final hearing

was held on May 2, 1955, before another trial judge. At that hearing, the wife testified, in effect, only that the husband had left the marital domicile in July of 1954 and had not returned except to pick up his personal belongings. The wife identified and placed in evidence a letter from the husband to the wife, dated September 24, 1954, a letter from his attorneys of the same date, and an "agreement between the parties and a stipulation between the attorneys for the parties, dated November 2, 1954." None of these papers is in the record here. At the conclusion of the wife's testimony her attorney advised the court as follows: "At this time, your Honor, I do not further pursue evidence to substantiate the plaintiff's complaint because I have been informed by my adversary that the defendant does not intend to contest the action for separation, and we have agreed that the plaintiff will accept and the defendant will pay in a final decree $125.00 a week towards the maintenance of the plaintiff. That is all." The trial judge then said: "Judgement is directed in favor of the plaintiff for separation on the ground of abandonment. Alimony is fixed in the sum of $125.00 a week * * *."

[1] In these circumstances it cannot be said that the "points and questions" presented in the instant suit for divorce were "actually litigated and decided" in the New York proceeding. Gordon v. Gordon, supra. The fact that the ex parte affidavits of the parties, containing, among others, their respective versions of the allegedly "cruel and inhuman treatment" charged against the other, were considered by a trial judge as a predicate for his award of temporary support to the wife is immaterial here, since it affirmatively appears that there was no actual trial of these charges nor any adjudication thereof.

Moreover, in order to sustain a charge of "cruel and inhuman treatment" under § 1161 of the New York statute as a ground for separation from bed and board, there must be proof of either actual violence committed with danger to life, limb or health, or a reasonable apprehension of such violence. See Marino v. Marino, Sup. 1955, 145 N.Y. S.2d 571, and authorities cited. No cases need be cited in support of the proposition that this is a far greater degree of proof than is required to support a charge of "extreme cruelty" or "ungovernable temper" under the Florida divorce statute. §65.04, Fla.Stat. 1957, F.S.A.

It is true that the trial judge stated in his opinion filed in the New York proceedings (but not in the judgment of separation itself) that the husband abandoned the wife "without provocation" on her part. But the New York statute, § 1161, supra, states as a ground for separation "the abandonment of the plaintiff by the defendant". **not** "the abandonment of the plaintiff by the defendant without provocation." Apparently, the wife's misconduct is a defense that must be pleaded and proved by the husband under § 1163, supra, and it affirmatively appears from the record here that the husband withdrew his defense to the wife's action and that no evidence was adduced **at the trial** as to the wife's misconduct. Thus, the only "point and question" actually litigated and decided at the trial was that the husband abandoned the wife. Even if it be assumed arguendo that § 1161, supra, should be interpreted to mean "abandonment without provocation" as a ground for a separation judgment, the question is concluded by the decision of this court in Horn v. Horn, Fla. 1956, 85 So.2d 860, 861. There, a New York judgment of separation from bed and board in favor

of the husband on the ground of abandonment was pleaded as a defense to the wife's suit for divorce in Florida on the grounds of extreme cruelty and habitual intemperance. In holding that the wife's suit was not barred, this court said that "where one spouse brings separate maintenance proceedings on the ground of abandonment, the judgment secured is not res judicata or estoppel as to Florida divorce proceedings by the other spouse on grounds of alleged habitual intemperance or extreme cruelty since the actions are entirely different."

[2] We have also considered the question of whether the Chancellor erred in finding that the husband "failed to sustain the material allegations of his complaint by a preponderance of the evidence." As background, it might be noted that the parties lived together a little over three years after their marriage, which took place just ten days after the wife was divorced from her former husband. She has two sons by her former marriage and is drawing $4,000 per year for their support from their father. The husband has a daughter who was adopted during his former marriage prior to the death of his then wife.

No useful purpose would be served in relating the various accusations that each spouse made against the other. Suffice it to say that the parties gave conflicting versions of various physical altercations between them during their marriage; and the wife categorically denied, in answer to leading questions by her attorney, that she ever physically assaulted her husband except in her own defense, or that she cursed and berated him and called him obscene names, or that she nagged and harassed him for household money. She did not, however, explain or

deny other testimony of the husband in support of his charges of extreme cruelty and ungovernable temper on the part of the wife, such as calling the attorney of a client of her husband's and making disparaging remarks about the husband to his great embarrassment or becoming enraged if he differed with her opinion in any matter, or making disparaging remarks about him to his daughter. Some of the altercations testified to by the parties were witnessed by their housekeeper who (although perhaps not a completely unbiased witness) corroborated the husband's testimony.

There can be no doubt that the family life of the parties was replete with marital and familial discord almost from the beginning. This is quite clearly another situation in which the marriage must be characterized as a "hopeless failure", as in McGee v. McGee, 149 Fla. 31, 5 So.2d 49, in which this court said that "This couple can never sail the matrimonial sea, except in storm, tempest, fog and misery. They can only wound and never comfort one another."

An analysis of the evidence reveals that the wife's testimony contradicted that of the husband in some but not all material respects. It should also be noted that the wife's testimony was completely uncorroborated, while that of the husband was supported by the housekeeper. When divorced from the atmosphere of "estoppel by judgment," which seems to have pervaded the hearing below, it is our view that there was sufficient evidence to support a decree in the husband's favor; and it must therefore be held that the Chancellor erred in denying to the husband a divorce.

This conclusion makes it unnecessary to dispose of the other questions here argued by the parties.

For the reasons stated, the decree here reviewed is reversed and the cause remanded for further proceedings not inconsistent herewith, including specifically disposing of the question of whatever financial interest or benefits, if any, the wife may have in the premises.

It is so ordered.

TERRELL, C. J., and THOMAS and HOBSON, JJ., concur.

DREW, J., dissents.